We also like to say that we agree with the reasons given by the learned judge as to why he declined to give any weight to the letter. One of these reasons is that despite the fact that TS2(b) purports to be an agreement between the parties, there was no signature of the respondents appearing on it indicating that they have accepted the term therein. On the other hand, in the two other documents, TS1 and TS2(a) which deal with 30 days credit and credit limit the respondents' signatures were insisted upon. The absence of the respondents' signature on the letter TS2(b), therefore, requires some explanation.

The other circumstance which rules out the existence of right to make appropriation is that the appellants keep their account continuously. No new account was opened as regards new debts. They are all in one current account. For this purpose we only need to refer to para 507 of 9 HLE, 4th edition, which is as follows:

"507. *Account current. Prima facie,* the right of appropriation by the creditor does not arise in the case of an account current, that is to say, where there is one entire account into which all receipts and payments are carried in order of date, so that all sums paid in form one blended fund. In such a case the presumption is that the first item on the debit side of the account is intended to be discharged or reduced by the first item on the credit side, and that the various items are appropriated in the order in which the receipts and payments are set against each other in the account."

Thus, whatever the state of indebtedness of the respondents to the appellants the latter have no right to make appropriation.

For the reasons given, we are of the view that the writ of seizure and sale against the respondents is misconceived and was therefore properly and rightly set aside by the learned judge.

The appeal is therefore dismissed with costs. And the deposit is to be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Wong Kuo Shing & Co.; Syarikat Davidason.*

AVEL CONSULTANTS SDN. BHD. & ANOR. v. MOHAMED ZAIN YUSOF & ORS.

[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C. JJ.) January 10 & April 1, 1985]

[Kuala Lumpur – Federal Court – Civil Appeal No. 135 of 1984]

Company – Director in fiduciary relationship with company – Breach of fiduciary duty.

Practice and procedure – Application for summary judgment – Breach of fiduciary duty by directors of company – R.H.C. 1980, O. 14.

In this case the first and second respondents were directors of the first appellant company while the third respondent was director of the second appellant company. The three respondents formed a firm with the object of carrying on business as consultant engineers, the same as that of the appellant companies. The firm canvassed for work and were appointed to carry on work in place of the appellants. The appellants sued the respondents for breach of fiduciary duties and after the defence was filed they took out a summons to enter judgment in their favour praying, *inter alia*,

(1) the Respondents be declared that they were trustees for Avel and Elmec in respect of all professional charges received by them and/or their firm Perunding AJZ from November 30, 1983 up to March 1, 1984;

(2) the Respondents be ordered to furnish an account of all sums so received during the aforesaid period; and

(3) for the said breach the Respondents be ordered to pay damages which should be assessed by the Registrar.

The learned trial judge who heard the application ruled that there was a clear breach of the fiduciary duty but he did not give judgment because he held that there were other reasons which entitled the respondents to defend the suit. These reasons were (a) because it was not clear to what extent and to which items of work of the firm the breach occurred; and (b) because the plea by the respondents justifying the breach was relevant to the question of damages. The appellants appealed.

Held: the cause of action in this case is founded on the fact that the respondents as directors of the appellants have committed breach of their fiduciary duties and this was so found by the learned judge. Once he so held there can be no more defence to the appellants' suit and they should therefore be entitled to judgment and the rest of the case should only be a matter of the requisite relief to which the appellants would be entitled consequential upon the finding.

Cases referred to:

(1) *Lynde* v. *Waithman* [1895] 2 Q.B. 180.

(2) *Contract Discount Corporation Ltd.* v. *Furlong & Ors.* [1948] 1 All E.R. 274.

SUPREME COURT.

Sri Ram (*Miss Liza* Chen with him) for the appellant.

C. Abraham (*Dulip Singh* with him) for the respondents.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): Avel Consultants Sdn. Bhd. (Avel) is a subsidiary of another company called Elmee Consultants Sdn. Bhd. (Elmec). The first and second respondents were directors of both ELMEC and AVEL, whilst the third respondent is the director of ELMEC only, the parent company. They were appointed to the board of these two companies on December 8, April 28, and May 7, 1981 respectively. The managing director of Avel at the material time was the first respondent whilst that of Elmec was one Johari Jaalam. These two companies are carrying on business of consultants and advisers in all kinds of engineering works.

A company called Fleet Group Sdn. Bhd. on behalf of one of its subsidiaries called System Talivisyen Malaysia Bhd. (STMB) by a letter dated 13.9.1983 appointed AVEL and ELMEC as Consultants in respect of engineering project known as Channel Three. Paragraph 6 of the letter stipulated a term of the appointment to the effect that in the event of resignation of any key personnel involved in the Channel Three project and/or breakup in partnership in Avel Consultants Sdn. Bhd., AVEL and ELMEC were required to inform Fleet Group of such fact so that it could decide what to do next. For this project on October 18, 1983 AVEL received as first progress payment from STMB a sum of $305,700/-.

On November 30, 1983 the three Respondents formed a firm called Perunding AJZ with the object of carrying on business of consultant engineers, the same as that of Avel and Elmec. The firm commenced its business on December 1, 1983 and began to canvass for work. It even approached established clients of Avel and Elmec for the purpose of obtaining work.

However, even before Perunding AJZ was registered as early as November 1, 1983 the first respondent as Managing Director of Avel, acting in accordance with para 6 of Fleet Group's letter of April 13, 1983 informed STMB that three key personnel of Avel, namely, Boon Kok Yong, Mark A Lian and Chee Yuen Foo would resign. It is observed that at that time none of these personnel had given any resignation letter. Chee Yuen Foo handed in his resignation letter at the end of January 1984, whilst Boon Kok Yong gave a similar letter on February 6, 1984. There is no evidence when Mark A Lian had given his resignation letter.

Pursuant to that notification on November 18, 1983 STEMB terminated Avel's appointment as consultant engineers and subsequently appointed Perunding AJZ to carry on with the Channel Three Project.

On January 15, 1984 Avel and Elmec sued the Respondents for breach of fiduciary duties and after the defence was filed they took our summons to enter judgment in their favour, *inter alia*, that:

(1) the Respondents be declared that they were trustees for Avel and Elmec in respect of all professional charges received by them and/or their firm Perunding AJZ from November 30, 1983 up to March 1, 1984;

(2) the Respondents be ordered to furnish an account of all sums so received during the aforesaid period; and

(3) for the said breach the Respondents be ordered to pay damages which should be assessed by the Registrar.

George J. who heard the summons refused the application and hence this appeal.

The law is clear that a director of a company is in fiduciary relationship with his company and as such he is precluded from acting in a manner which will bring his personal interest into conflict with that of his company. Clearly the formation of Perunding AJZ was carefully planned. The firm is not only a rival of AVEL and ELMEC of which at the material time the Respondents were directors. It obtained the very job which was AVEL's job. Not only that, the firm canvassed for work from Avel's and Elmec's established clients, Kontena Nasional Sdn. Bhd. and there is even evidence to show that the Respondents engineered the resignations of the key personnel on Channel Three project. This is borne out by the evidence that the first Respondent purporting to act as Avel's managing director informed STMB of the pending resignation of these personnel some three months before the personnel handed in their resignation letters. The result of this notification was at the expense of Avel which lost the job with the corresponding benefit to Perunding AJZ which gained it. It is, therefore, clear that there can be no defence to issue of breach of fiduciary duties. In fact, the learned judge ruled that there was a clear breach

but he was not prepared to give leave to Avel and Elmec to sign the judgment because in his view there were other reasons within the meaning of 0.14 r.(3) which entitled the respondents to defend the suit. These reasons are : First, because it was not clear to that extent and to which items of work of Perunding AJZ the breach occurred; and secondly, because the plea by the respondents justifying the breach is relevant to the question of damages. To support his decision the learned judge relied upon two cases.

In our view these two cases do not go further than mere application of established principle when dealing with an Order 14 application in that the application cannot be granted where the defence raises a plausible dispute. In *Lynds* v. *Waithman*[1] the writ was specially indorsed with a claim for liquidated sum, but the evidence went on to show that there was a plausible dispute as to the amount which was due to the plaintiff. Application for Order 14 was therefore refused. On the other hand in *Contract Discount Corporation Ltd.* v. *Furlong & Ors.*[2] an Order 14 application was granted to the plaintiff but only for such amount as would reasonably represent the extent of the defendant's admission. The amount claimed was £19,811.00. The defendant admitted liability of £10,000.00 "or thereabouts". The Court of Appeal held that the admission did not mean exactly £10,000.00 because it was qualified by the expression "or thereabouts". It therefore granted leave to the plaintiff to sign final judgment to the extent of £8,000.00 only.

Encik Sri Ram, counsel for Avel and Elmec, submitted that these two cases are not applicable in the context of the present appeal. Both the *Lynde* v. *Waithman* and *Central Discount Corporation* cases are cases involving claim for liquidated sums, whereas the case under appeal deals with a claim for account and unliquidated damages. It is his submission, therefore, that once a breach of fiduciary duties is proved and there is no defence to this issue, the court under Order 14 application should give the declaratory judgment asked for and leave the question of assessment of damages and rendering of accounts to be dealt with by the Registrar.

We are of the opinion that this submission is well-founded. The cause of action is founded on the fact that the respondents as directors of the appellants have committed breach of their fiduciary duties and this was so found by the learned judge. Once he has so held, there can be no more defence to the appellants' suit and they should therefore be entitled to judgment and the rest of the case should only be a matter of the requisite relief to which the appellants would be entitled consequential upon the finding. Thus, the reservations which the learned judge alluded to, *i.e.* the identification of jobs which were subject to fiduciary duties and those which were not during the period within which the breach was committed and the reason for the respondents breaking away from the appellants – all these are relevant only for the determination of the extent of the remedies asked for. They are not relevant as a defence to the question of breach of fiduciary duties, which the learned judge has already held to have been established.

That being the case, we allow this appeal with costs here and the court below. The deposit is to be refunded to the appellants. The order which emanates from this judgment is that:

(a) judgment is entered in favour of the appellants on their claim that the respondents had acted in breach of their fiduciary duties;

(b) damages for such breach are to be assessed by the Registrar and the accounting by the respondents of all income in respect of all contracts for services secured by them or Perunding AJZ between 30.11.1983 and 1.3.1984 is to be dealt with by the same officer;

(c) there will be liberty to apply to the High Court generally if and when necessary.

Appeal allowed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Dulip Singh & Co.*